No. 12521

United States
COURT OF APPEALS
for the Ninth Circuit

PORTLAND-COLUMBIA LUMBER CO.,
a Corporation,
Appellant,

v.

J. W. FEAK, d/b/a J. W. FEAK MERCANTILE COMPANY,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

JUSTIN N. REINHARDT,
Portland, Oregon,
Attorney for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND 10–50

INDEX

TABLE OF AUTHORITIES

No. 12521

United States
COURT OF APPEALS
for the Ninth Circuit

PORTLAND-COLUMBIA LUMBER CO., a Corporation,

Appellant,

v.

J. W. FEAK, d/b/a J. W. FEAK MERCANTILE COMPANY,

Appellee.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

REPLY BRIEF OF APPELLANT

Appellee's brief (p. 17*) reiterates the basic proposition of law expounded in appellant's main brief (Point II), *"If good faith is established,* the price obtained at the resale is sufficient to support a verdict without other evidence of market price." (Italics ours)

*Page references are to appellee's brief unless otherwise indicated.

To establish his good faith, appellee undertakes to explain:

why no resale was made until June 9th although the breach occurred in March (pp. 13-15); and

why the amounts realized on the resales were less than the market quotations reported in Crow's Digest (pp. 4-6, 12).

It is respectfully submitted that, instead of accomplishing his purpose he has, in fact, demonstrated appellant's thesis: That there is no evidence in the record of appellee's good faith in effecting the resales and, therefore, no basis for the jury's verdict and the judgment entered thereon.

POINT I

Appellee's Delay in Effecting the Resales

Appellee inquired (p. 13), as we did, "What, if any, evidence there is concerning the good faith and diligence of appellee in making the resale." Every single assertion he makes in reply to that inquiry is totally without foundation in the record. The absence of any reference to the record on pages 13, 14 and 15 of appellee's brief is the most glaring admission of the unsoundness of appellee's position.

Repeatedly, appellee seeks to make it appear (pp. 4, 13, 14) that there was some "general discussion" following the breach and continuing until May 15th which justified appellee in deferring his resales until some time thereafter.

The fact is that there was no such discussion; and the letter of May 15th mentioned in Exhibit 8 (R. 115-116) which appellee describes as "a positive written repudiation of the contract" which "he finally secured from appellant's counsel some time after May 15th" (p. 15) was simply a notice that "this lawsuit would be filed" (R. 85). Appellee's attempt thus to justify his delay by tieing it to a letter which is not even in the record discloses the fatal weakness of his position. For regardless of what that letter of May 15th said, one thing is clear: it is not in the record. And the absence of that letter and of any other evidence of justification for appellee's delay in making the alleged resales is precisely why the verdict and the judgment entered thereon were improper (main brief, Point II*).

On the other hand, the record is full of testimony by the appellee showing that he knew in March that the contract had been unequivocally breached. At page 98, he said (italics ours):

> "A. No, at the time the third car was refused and *I knew there was no hope of getting Mr. Rothstein to take it,* there was that much lumber accumulating and further shipments to the side track were stopped simultaneously with the knowledge that Mr. Rothstein would not take the third car.
>
> Q. You testified yesterday it was late in March, not later than March 30th?
>
> A. I will let that answer stand."

Again on page 79, Feak testified:

> "A. I called Mr. Rothstein on the third car, the same as the first two.

*Appellant's main brief will be cited throughout in this manner.

Q. And that was between the 20th and 30th of March?

A. Yes.

Q. And he told you he wasn't going to take any more four-inch lumber?

A. Yes; he refused to give me shipping instructions and said he wouldn't take any more lumber.
* * * *

Q. Did Rothstein then indicate to you that he wouldn't take one and two-inch lumber?

A. My recollection is that he did. That either Mr. Powers or Mr. Rothstein said he wouldn't take one and two-inch and I am almost positive that Mr. Rothstein would not take any more lumber."

This and other testimony of the appellee (R. 70, 81, 86, 87) shows the disingenuousness of appellee's argument (p. 14) that there was some doubt as to whether appellant had "in fact repudiated the contract".

Unless appellant unequivocally breached the contract in March, appellee was obligated to deliver one and two-inch lumber to Carlson's mill in Vancouver without further instructions (R. 86). He never did; and the statement (pp. 14-15) that Feak "sought to obtain an unequivocal repudiation * * * by talking with Powers * * * and by corresponding with appellant's counsel" after March 30th is a bare-faced misrepresentation of fact. But fact or not, the important thing about it is that it is *not* a fact of record, and, therefore, not available to support the verdict.

It is worth noting the inconsistency between this argument of appellee to justify his delay and the immediately preceding portion of his brief, in which he attempts to demonstrate his diligence. The date of the efforts appellee allegedly made "to sell this lumber in

Tacoma and Olympia and other places" (p. 13) is fixed by his testimony (R. 72) that "I finally sold, *months later,* the lumber that I had transported to Tacoma". The first resale occurred on June 9th, and if that was "months later" it must follow that the earlier efforts were made in March or April. Thus, on the one hand, appellee seeks to construe the record as showing efforts on his part to make sales during March and April and, on the other hand, he argues that he waited to make any sales until after there had been a "positive written repudiation of the contract" about May 15th which is *not* a matter of record.

And it is significant that appellee feels called upon to acknowledge (p. 13) that "he did not testify in detail as to the particular concerns to whom he tried to sell this lumber" and to suggest that the burden rested on appellant to remedy this defect in his testimony by bringing it out on cross examination (p. 14).

It would have been vain for appellant to attempt to elicit the details of appellee's alleged efforts at resale, as the following excerpt from his cross examination clearly demonstrates (R. 97-8, cf. 104):

> "Q. Is it your statement that you were unable to sell any of this lumber before June 9th? Just yes or no, Mr. Feak?
>
> A. Yes; at the price I finally received. (103)
>
> Q. In other words, at any time prior to June 9th it would have been impossible for you to sell this lumber for $32.50 a thousand, or more?
>
> A. I got forty dollars for it.
>
> Q. Yes or no, Mr. Feak?
>
> A. On part of it, yes, on part of it, no.

Q. All right. Now, I take it then that you refer to the fact that part of this was sold at $32.50 and part at $40.00.

A. Yes.

Q. Now, as to the part sold at $32.50, is it your statement that you could not have sold that for $32.50 or more prior—what was the date of that sale?

A. That sale was—I don't have the dates of the sale here. My bookkeeper is here. He could give it to you. You can ask him.

Q. Well, but it wasn't before June 9th?

A. No; it wasn't.

Q. Was it before July 9th?

The Court: He says he doesn't know, Mr. Reinhardt, and we will just put in a lot of time.

Mr. Reinhardt: All right."

The fact is that even the A. B. Small Company case (pp. 15-16) on which appellee relies so heavily, explicitly mentions the extremely detailed nature of the evidence offered by the seller there regarding his diligence in making the resales, saying (45 S. Ct. at p. 303):

> "We are of opinion that the evidence as set forth in the record conclusively established that the resales were made within a reasonable time. The state of the market was such that it was difficult to make any sales; and the quantities to be sold enhanced that difficulty and also the need for care. The witnesses for the plaintiff described with much detail the efforts which were made, and the evidence as a whole reasonably admitted of no other conclusion than that the efforts were timely, well directed and persistent. Many bids were received, but almost all were so low that their acceptance would have meant a great sacrifice. The defendant was notified of the purpose to resell, but made no effort to advance it in point of time or to bring in a purchaser at an acceptable price. Considering the

state of the market, the outcome appears to have justified both the time and care taken by the plaintiff."

To the same effect see the Obrecht case (main brief, pp. 18-20).

Appellee's brief will be searched in vain for *any* statement supported by record reference offering any justification for a lapse of almost three months between the date of the breach and the date of the resale. It is clear, as a matter of law, under the cases cited, both by appellant and by appellee, that in the absence of some such evidence, a verdict cannot be based upon the price realized on a resale.

POINT II

The Evidence Regarding Market and Market Prices Between the Date of the Breach in March and the Date of the Resales Commencing in June

Although it is not offered as a justification for appellee's delay in making these resales, it is true that if the resales had been made at prices as high as the market prices prevailing during a reasonable period following the date of the breach, that fact would be evidence of appellee's good faith and diligence in minimizing damages (cf. p. 12). Therefore, in order to justify a verdict based upon the resale price rather than the market price, it was incumbent upon appellee to offer such evidence. Frankel v. Foreman & Clark, 33 Fed. (2d) 83, 2 Cir. (1929) (main brief, pp. 22-23). Without such evidence

the market price (main brief, Point I), not appellee's resales (main brief, Point II), is the measure of his recovery.

Accordingly it is only natural that evidence of what the market was during the period between the breach in March and the resale in June should have been introduced by appellee (cf. pp. 5, 6, 13). Appellee's misfortune is that this evidence of a market at and following the date of breach establishes a market price higher than the amount realized on the resales, thereby discrediting his own testimony regarding his alleged attempts to resell this lumber prior to June (pp. 4, 13-14). It was not necessary, therefore, for appellant to dispute appellee's testimony on that point, or to offer evidence thereon. That burden was discharged by appellee.

Appellee offered in evidence copies of Crow's Price Reporter for the period from March 19th on (Ex. A-4). Those publications show that for a period of at least six weeks following the breach, the market price was in excess of the contract price of this lumber (main brief, p. 4).

Appellee dismisses these quotations from Crow in favor of the testimony of the "disinterested"* witness (p. 5) Barr, who stated that the price of rough cants in May and June would run from twenty-five to thirty-five dollars and rough boards and dimension lumber five dollars more (R. 108-110). The price reported by Crow which Barr said "is based on information obtained from (Bucoda) and from other mills like yours" (R. 111) was

*Barr was an employee of Bucoda, the firm to which Feak sold this very lumber (R. 107).

far higher both in the category "Rough Green Plank & Small Timbers" and "Rough for Remilling". Investigation of this apparent discrepancy between Barr's testimony and Crow's price quotations was cut off by the Court (R. 111) and the Court itself observed as to a question asked Barr about prices during April: "[It] is almost self evident that the witness can't remember" (R. 122).

Thus, there is no evidence whatever regarding the market price of this type of lumber in *April* other than Crow's Price Reporter, and no credible evidence other than Crow's regarding market prices in May and June. The "explanation" by Mr. Barr quoted in appellee's brief (p. 6, see also pp. 10-12) that Crow's prices are "correct for specified lengths" but not for random lengths is directly contrary to the facts. The fact that Crow's quotations *are* for random lengths and widths is demonstrated by Crow's repeated explicit reference to "specified lengths" when that is what the price quoted applies to (*expressio unius, exclusio alterius*).

One thing the witness Barr did state unequivocally:

> "Q. But whether that lumber can be disposed of to a local buyer, certainly those quotations indicate that it could be disposed of on the West Coast at the prices in these specified lengths?
>
> A. Yes, sir.
>
> Q. And that is true of all the other information contained in here?
>
> A. It is close." (R. 113)

Furthermore, the appellee himself testified about Crow's quotations:

"Q. Those figures indicate the market during those respective periods, do they not Mr. Feak?

A. They indicate a falling market; yes.

Q. Whether it was rising or falling, those were the prices at which transactions occurred during that time, weren't they?

A. I assume so." (R. 101)

Thus, in this aspect, at least, the instant case resembles those "cited by appellant * * * where the uncontradicted evidence established a higher market than the resale price and also established the fact that such higher price could have been obtained." (p. 10).

Crow's price quotations make it apparent that $32.50 a thousand was not a fair price for this lumber (p. 5) even at the time appellee sold it. It certainly is far below what could have been realized during a reasonable period following the breach for cants, or, at any time, for boards and dimension lumber of grade #3 and better of random lengths.

Here, as elsewhere, appellee runs afoul of the record. He says (p. 4, see also pp. 5, 9): "As is correctly stated in appellant's brief (page 3) most of the lumber was sold at a price of forty dollars per thousand." The Court can examine page 3 of appellant's brief, as we did, but nowhere will it find such a statement because the statement is not true. And it would not be true even though, by inadvertence, it did appear in appellant's main brief. Appellee's very first sale of 232,078 feet in one batch on June 9th (R. 124) for thirty-three dollars a thousand constituted more than half of all the lumber here in question.

It is true that most of the *sales* (but not most of the

lumber sold) were at $40.00 a thousand. But two individual sales, the one of June 9th of 232,000 feet at $33.00 a thousand and the one of 64,000 feet to Bucoda Lumber Company at $32.50 a thousand, together account for almost all of appellee's alleged loss outside of the hauling item. It is submitted that this circumstance by itself raises a question as to appellee's diligence and good faith (R. 104). Certainly, in the context of this record, these two sales are not entitled to be taken at face value without some explanation. The record contains none, unless it be appellee's assertion (p. 10) that the lumber he "resold" graded as low as number 4. As usual, his statement is not supported by any reference to the record. If true, however, it may explain why appellee was not able to resell at the contract price (p. 8); and it certainly explains why the amount he realized is not a measure of his recovery.

By his own testimony, this lumber was supposed to be of the same grades "as formerly shipped" (R. 66, 118). The twenty-six invoices (Ex. 4 A-Z, R. 3) which covered the lumber "formerly shipped" show grades in each instance; and in no instance is there any grade below number 2. That portion of the stenographic transcript of Feak's testimony which, although part of the record before this Court (R. 56), was not printed, is full of testimony showing that the lumber was sold on grade (p. 12, lines 17-22, p. 13, line 20, pp. 56-73 of stenographic transcript of Feak's testimony). Thus, Feak's own testimony gives the lie to his assertion that (p. 2) "the contract did not call for any particular grades". Rather than providing a justification for the low price realized on the resale,

appellee's assertion (p. 13) "that this was ungraded lumber" shows, beyond any possibility of dispute, that the verdict based upon the prices alleged to have been realized on these alleged "resales" cannot be allowed to stand because the lumber did not conform to the contract.

POINT III

Appellee's Discussion of the Authorities

As we stated at the outset, there appears to be complete agreement between appellant and appellee upon the basic proposition of law. In addition to the language quoted on page 1 supra from page 17 of appellee's brief, he reiterates the proposition on page 21 of his brief "*that if ordinary diligence is shown,* it is sufficient for the seller to prove the price received at the resale." Since it is clearly demonstrated by this record that ordinary diligence is *not* shown, we deem it unnecessary to comment on appellee's discussion of the Washington cases (pp. 19-24).

However, special attention should be paid to appellee's discussion (pp. 25-30) of the other cases cited in appellant's main brief, particularly (p. 27) the Derami case. Throughout his discussion of the authorities, as throughout the discussion of the evidence, appellee persistently slurs over the important qualifying clause, "if diligence was shown". This is strikingly illustrated on page 28 of appellee's brief: In the first paragraph, the qualifying clause is "if diligence was shown"; in the second, "the seller having used due diligence"; and the third, "if the

resale was fairly conducted". The same qualifying language appears in the discussion of every case from page 27 on; and the reference to the A. B. Small cases in appellee's discussion of the Derami case shows that even those cases propound "the question of whether or not reasonable diligence was shown" (p. 27) by the seller.

Thus, we are brought back to appellant's basic argument, which is that the record is totally devoid of any evidence of reasonable diligence on the part of the appellee in making these resales. Whatever evidence there is in the record on that subject indicates a wanton lack of diligence. It follows, as a matter of law, that the record does not support the verdict, and the judgment entered thereon must be reversed and the judgment reduced to a nominal sum or a new trial ordered to establish the amount of appellee's recoverable loss, if any.

Respectfully submitted,

JUSTIN N. REINHARDT,
Attorney for Appellant.